Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

VALERIE JANE CARTER, individually, and as personal representative of the estate of JAMES MIKEAL CARTER, deceased; and as next friend and natural and legal guardian of ANDREA NICOLE CARTER, ROBYN MARIE CARTER and MICHAEL A. CARTER, minor children,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Given the military has removed "line command" in the delivery of medical services, is it appropriate today to judicially impose the *Feres* doctrine to bar medical malpractice claims brought by military personnel for treatment of injuries *not* incident to service? The Fourth and Fifth Circuits have held that a claim by survivors of a service member committing suicide in a military hospital is not *Feres* barred because suicide in a military hospital is not incident to service; the Ninth Circuit here held suicide *is Feres* barred despite the fact that deceased's presence in the hospital was unrelated to any service activity and his physician refused to attend to him although requested to do so by appropriate medical support staff.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iv
Table of Appendices	vii
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provision Involved	1
Statement of Facts	2
Proceedings Below	4
Reasons for Granting the Writ	5
I. Conflicts Among The Circuits: Disparate Results.	8
II. The Government Has Changed Health Care Delivery.	14
A. The *Feres* Cases (*Jefferson* and *Griggs*)	15
B. The Evolution Of Military Health Care	16

Contents

Page

C. The Government Has Removed "Military Command" From Health Care. 17

D. Civilian Control Of Military Health Care 18

III. Application To Petitioner's Action 19

Conclusion 24

TABLE OF CITED AUTHORITIES

Page

Cases:

Adams v. United States, 728 F.2d 736 (5th Cir. 1984) 11

Appelhans v. United States, 877 F.2d 309 (4th Cir. 1989) 10

Atkinson v. United States, 825 F.2d 202 (9th Cir. 1987) 16

Borden v. Veterans Administration, 41 F.3d 763 (1st Cir. 1994) 13

Bradley v. United States, 161 F.3d 777 (4th Cir. 1998) 6, 12, 14

Brooks v. United States, 337 U.S. 49 (1949) 6, 11, 12, 15, 22, 23

Cortez v. United States, 854 F.2d 723 (5th Cir. 1988) 6, 7, 10, 11, 12, 14, 16

C.R.S. v. United States, 761 F. Supp. 665 (D. Minn. 1991) 7, 16

Dreier v. United States, 106 F.3d 844 (9th Cir. 1996) 8, 9, 13, 14, 20, 21

Elliott v. United States, 13 F.3d 1555 (11th Cir. 1994) 9, 10

Cited Authorities

Page

Feres v. United States, 340 U.S. 135 (1950) .... *passim*

Jackson v. United States, 110 F.3d 1484 (9th Cir. 1997) 21

Jefferson v. United States, 178 F.2d 518 (4th Cir. 1949) 15, 16

Johnson v. United States, 704 F.2d 1431 (9th Cir. 1983) 20

Kendrick v. United States, 877 F.2d 1201 (4th Cir. 1989) 12

Lutz v. Secretary of the Air Force, 944 F.2d 1477 (9th Cir. 1991) 8

Madsen v. United States, 841 F.2d 1011 (10th Cir. 1987) 13, 14

Persons v. United States, 925 F.2d 292 (9th Cir. 1991) 12

Stanley v. United States, 483 U.S. 669 (1987) 8

United States v. Brown, 348 U.S. 110 (1954) 12, 20, 22, 23

United States v. Griggs, 178 F.2d 1 (10th Cir. 1949) 15, 16

Cited Authorities

Page

United States v. Johnson, 481 U.S. 681 (1987) 8, 20, 21, 22

United States v. Shearer, 473 U.S. 52 (1985) 23

Statutes:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2674 1

28 U.S.C. § 2680 1

Other Authorities:

32 Duq. L. Rev. 219 (1994) 7

Stephen C. Joseph, M.D., Assistant Secretary of Defense (Health Affairs), "Military Medicine: In Step, Adept, Flexible," 11 *Defense Issues* 11 (January 22, 1996) 21

TABLE OF APPENDICES

Page

Appendix A — Memorandum Of The United States Court Of Appeals For The Ninth Circuit Dated And Filed May 18, 1999 ..... 1a

Appendix B — Memorandum Decision And Order Of The United States District Court For The Northern District Of California Dated October 29, 1997 And Filed October 30, 1997 ..... 7a

Appendix C — Judgment Of The United States District Court For The Northern District Of California Dated October 29, 1997 And Filed October 30, 1997 ..... 13a

Valerie Jane Carter individually and as personal representative of Mikeal James Carter, deceased, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, to both clarify and limit the "*Feres* doctrine" in medical malpractice claims to medical care rendered as a result of injury suffered incident to service.

OPINIONS BELOW

The opinion of the Court of Appeals (referred to herein as "Carter Appeal") appears at Appendix A to the petition and is unreported. The opinion of the district court appears at Appendix B to the petition and is unreported.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment and order on May 18, 1999. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 2674 of the Federal Tort Claims Act provides, in pertinent part, that "the United States shall be liable, respecting the provisions of the title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances. . . ." Section 2680 of the Federal Tort Claims Act provides, in pertinent part, an exception stating this chapter will not apply to "any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard during times of war."

STATEMENT OF FACTS

The deceased, Mikeal James Carter, was employed as a Navy Corpsman by the United States Navy in Monterey, California. On June 3, 1994 Carter was off-duty driving his private automobile on a public roadway (off base) on a personal errand (unrelated to his capacity in the military), when his vehicle was involved in a collision with a second private automobile driven by a civilian, which resulted in Carter suffering personal injuries. Carter was treated by non-military personnel at the accident scene and then transported by private ambulance to a private hospital (Community Hospital of the Monterey Peninsula) in Monterey County where he was treated by medical personnel and released. Carter sustained whiplash injury to his neck requiring a neck brace, as well as injuries resulting in headaches and backaches.

Within a week of the automobile collision, Carter began for the first time to experience and suffer extreme psychological problems, including depression and unexplained anger outbursts. By contract of the defendant, he was treated at his duty station on June 10, 1994 by a civilian psychiatrist whose course of treatment involved the use of prescription drugs including anti-depressants. Carter's duty station was the Naval Medical Administrative Unit, Presidio of Monterey, California. Notwithstanding this treatment, his psychological problems intensified, resulting in his suffering a fifteen minute focal point seizure while at his residence on the evening of September 27, 1994.

On September 28, 1994 Carter on his own volition returned to the base clinic at Monterey. He was examined and returned to active duty. Near the end of his duty assignment that same day, he suffered a loss of consciousness for the first time ever in his life. Defendant that same evening caused Carter to be transported by private ambulance to Oakland Naval Hospital for further evaluation.

Enroute to Oakland Naval Hospital, Carter suffered another seizure. As a consequence, he was taken to a private hospital (Saint Louise Hospital, in Morgan Hill) where he was treated by medical personnel and administered additional drugs. At the direction of the defendant, he was released and then continued enroute by private ambulance to Oakland Naval Hospital. While again enroute, Carter suddenly stopped breathing.

Carter was then taken to another private hospital (Saint Rose Hospital in Hayward), where again he was treated by medical personnel. Over the protestation of the defendant, the civilian physicians at Saint Rose Hospital refused to discharge Carter to defendant for five (5) days, retaining him in the intensive care unit at Saint Rose. Carter was then released for private ambulance transport to Oakland Naval Hospital.

On January 6, 1995 the defendant returned Carter to active duty, changing his assignment to Oakland Naval Hospital as a corpsman. This duty reassignment was done allegedly because the doctors wanted to continue to observe him. Between January 6, 1995 and February 1, 1995, on two separate occasions defendant removed additional spinal fluid, yet they classified his problems as "psychological" in nature. *Defendant placed Carter on inactive status for observation.*

On Wednesday, February 1, 1995 Carter *upon his own initiative requested and was admitted* to Oakland Naval Hospital's psychiatric ward for "24 hour suicide watch" and evaluation.

Carter was again examined and evaluated by doctors and on February 3, 1995 they decided to operate on him, to insert a "shunt" in the rear of his skull on the following Monday, February 6, 1995. On February 3, 1995 and in preparation

of the scheduled operation, Carter was taken off the three anti-depressant drugs earlier prescribed by the civilian psychiatrist in Monterey.

On February 4, 1995 Carter exhibited severe depression and anxiety and military medical personnel on duty repeatedly requested that the treating naval psychiatrist in charge examine and return him to suicide watch. The naval psychiatrist in charge refused to visit or examine Carter; he also refused to return him to suicide watch. As a consequence, Carter was not returned to suicide watch.

On the evening of February 4, 1995 in the Oakland Naval Hospital ward where Carter was left unattended and alone, he hung himself with a bed sheet. He died because and only because defendant refused the earlier requested suicide watch.

PROCEEDINGS BELOW

This case involves claims for wrongful death brought by the widow and three minor children of a serviceman who committed suicide on February 4, 1995 in a Navy hospital. Plaintiffs duly filed their claim with the Navy on June 29, 1995. On January 19, 1996 the Navy rejected the claim based upon the *Feres* doctrine.

On July 17, 1996, plaintiffs filed their action in the district court for wrongful death. Valerie Jane Carter was appointed guardian ad litem of the three minor children on July 23, 1996. On July 26, 1996, plaintiffs filed their first amended complaint for damages. On September 20, 1996, defendant filed its answer.

On October 23, 1997, the district court heard the government's motion to dismiss, and thereafter entered an order and judgment on October 30, 1997 dismissing said

action for lack of subject matter jurisdiction pursuant to *Feres v. United States*, 340 U.S. 135 (1950). The district court stated it was bound to follow controlling Ninth Circuit authority that "a medical malpractice claim against a naval hospital is a situation squarely covered by other Feres doctrine cases and Feres itself." *Feres v. United States*, 340 U.S. 135 (1950).

The Ninth Circuit affirmed the district court, holding in part that:

> Carter cites no case in which any court has allowed a medical-malpractice claim against the United States by a service member on *active duty* to go forward. [ ] . . . [A]ppellant mainly argues that Feres is poor policy and that its underlying rationales are not so compelling today as they were 50 years ago, particularly because the military has increasingly modeled its medical benefits after those offered in the private sector. [ ] We have often criticized the Feres doctrine for similar reasons but were nonetheless bound to apply it. As we have noted, limiting the reach of Feres, given its decades-long vitality, has become a matter for either Congress or the Supreme Court.

(Emphasis added).

REASONS FOR GRANTING THE WRIT

The *Feres* doctrine is now almost fifty years old; times have changed since its interpretation of the Federal Torts Claims Act (FTCA). *Feres* is unevenly, inconsistently, and unfairly applied. The subject of service member "status", "incident to service", and "suicide" receive different treatments within the circuits, resulting in conflicting results for claimants. The intent of *Feres* in medical malpractice claims is no longer appropriate because the health care model upon which it is based has been supplanted with a new model.

Relevant to this petition, there presently exists conflicts in the circuits as to whether "suicide" in a military hospital is "incident to service." The Fifth Circuit in *Cortez v. United States*, 854 F.2d 723 (5th Cir. 1988), held that a service member jumping from an eighth-floor window after being left alone in a military hospital following a suicide attempt was not barred by the *Feres* doctrine. The Fourth Circuit has followed *Cortez* in *Bradley v. United States*, 161 F.3d 777 (4th Cir. 1998). The *Bradley* court stated, "Cortez's suicide while in a military hospital was found to be an isolated act independent of any service-connected injury. [ ] We do not hold that Feres doctrine bars an action based upon a truly independent [suicide] or post-service tort." *Id.* at 780. Although requested to do so, the Ninth Circuit has refused to follow these cases, holding here that suicide in a military hospital is *Feres* barred because *all* medical malpractice claims involving "active duty" service members *are* barred as "incident to service" under the *Feres* doctrine.

There is need to clarify and simplify the "incident to service" test, particularly in medical malpractice cases as to whether the claim arises from treatment for an injury incident to service, as compared to treatment for every day health care needs having ". . . nothing to do with army careers . . . except in the sense that all human events depend upon what has already transpired." *Brooks v. United States*, 337 U.S. 49, 52 (1949).

Together with medical malpractice cases, a more consistent, unifying approach to the *Feres* test is required. Petitioner proposes a simple and straight forward clarification of "status" in *Feres* cases: the *Feres* bar is applicable only to those injuries that are truly incident to military service. Assuming that the medical treatment rendered had no relationship to any injury or ailment resulting from an activity incident to military service, under the proposed test the action

would be cognizable under the FTCA. Because negligent medical care is a reasonably foreseeable consequence of injuries, claims arising out of negligent medical treatment would be *Feres* barred only if the *injury* treated occurred incident to service. Thus, this test would be applicable regardless of *when* the malpractice occurs, removing the *arbitrary* timing of whether the malpractice occurs before or after the service person's discharge or assignment to the Temporary Disability Retirement List (TDRL), or whether the service member's status is active or inactive.

"Cortez's death was not caused by a service-connected injury. Feres is applicable only to such injuries." *Cortez v. United States*, 854 F.2d 723, 727 (5th Cir. 1988). ". . . [I]t is highly questionable that elective surgery wholly unrelated to a serviceman's military duties is 'incident to service'. . . ." *C.R.S. v. United States*, 761 F. Supp. 665, 669 (D. Minn. 1991).

Petitioner seeks Supreme Court ratification of the *Cortez* and *C.R.S.* holdings providing a uniform minimally limiting *Feres* test. Congress in enacting the FTCA did not intend to expose the federal Treasury to claims for injuries occasioned by activities incident to military service, given the inherently dangerous nature of such activities, and petitioner does not challenge this intent. Petitioner seeks only this simple test to trigger the *Feres* bar, to eliminate the pervasive confusion in the lower courts' rulings, to support the basic rationale for *Feres*, and to simplify the judicial task of determining when an FTCA action is and is not precluded. *See* 32 Duq. L. Rev. 219, 250 (1994).

I.

CONFLICTS AMONG THE CIRCUITS: DISPARATE RESULTS.

"Dying in the right circuit" has taken on a new meaning since the last Supreme Court decision on a *Feres* case. Although this Court attempted to put the *Feres* doctrine to rest in *United States v. Johnson*, 481 U.S. 681 (1987), the circuits have been unable to develop consistent standards to determine if cases are *Feres* barred. In particular, some of the circuits do not treat active duty status as the deciding factor when determining if the suit is *Feres* barred; while others hold determination of "status" begins and ends the inquiry.

Ironically in the Ninth Circuit, active duty status is not the deciding factor — except in medical malpractice claims. In *Lutz v. Secretary of the Air Force*, 944 F.2d 1477 (9th Cir. 1991), the Ninth Circuit expressly refused to solely apply active status as a criteria, because such a broad indicator would operate to disallow claims by service members entirely. *Id.* Such a sweeping preclusion rule was also expressly rejected by the Supreme Court in *Stanley v. United States*, 483 U.S. 669 (1987). *Id.* The court ruled that the presence of active duty status or subjection to military discipline is insufficient standing alone to invoke *Feres*. *Id.* at 1486.

In *Dreier v. United States*, 106 F.3d 844 (9th Cir. 1996) the Ninth Circuit again ignored status. There, the active duty service member availed himself of a benefit of service by utilization of the base facilities for recreational pursuit. After sunbathing, swimming and drinking beer, the service member and some of his friends decided to take a walk in the area. During the walk, the group came upon a drainage channel which was hidden by overgrown foliage. The service member

fell into the channel and was crushed to death; yet, his survivors' claim was not *Feres* barred. Service member beneficiaries also used the same base recreational area as well as public sector civilians (albeit technical trespassers).

In the face of the government's alleged negligence, the Ninth Circuit had to weigh whether it would treat Dreier's survivors differently simply because he was an active duty service member as compared to the benefit of judicial recourse had he not been. In *Dreier*, the affording of judicial recourse and consequential protection of the other non-service member users of the same recreational area from the government's negligence was paramount to the Court's analysis and ultimate decision. That is, government negligence which extends beyond the scope of service members, and reaches to service member dependents *and* civilians, cannot be characterized as peculiar to the service member's status and therefore is not *Feres* barred as "incident to service." The government did not seek review. (The Ninth Circuit refused to adopt this *same* reasoning in *Carter*, below.)

The Eleventh Circuit also looks beyond the duty status of a service member at the time of injury. In a case involving a faulty ventilation system in a military apartment building, a service member and his wife filed an FTCA claim for extensive injuries resulting from carbon monoxide poisoning. *Elliott v. United States*, 13 F.3d 1555 (11th Cir. 1994). In determining whether *Feres* barred the suit, the court looked at the "totality of the circumstances" to determine if *Feres* applied. The court also inquired into the three rationales for the *Feres* doctrine. *Id.* at 1559. After dismissing the first, the distinctively federal nature of the relationship between the government and members of its armed forces, and the second, the availability of alternative compensation systems, viz. Veterans Benefits Act, as "no longer controlling, if not completely erroneous," the court then focused on the effect

of the suit on military discipline. *Id.* The court found that "providing and maintaining single-family housing for military personnel does not involve the federal judiciary in sensitive military affairs or the 'second-guessing of military orders.' " *Id.* at 1560. Consequently, the court ruled that the *Feres* doctrine did not bar the plaintiff's suit. *Id.* at 1563. One of the three original *Feres* cases decided was a housing case very similar to *Elliott.*

The Fourth Circuit has also expressly rejected treating active duty status as a dispositive factor. In a medical malpractice case, a serviceman who was on excess leave awaiting the ruling of an appeal of his court-martial, sought medical treatment at a military hospital. *Appelhans v. United States*, 877 F.2d 309 (4th Cir. 1989). The plaintiff argued that since his injury occurred while he was on excess leave pending discharge, his injury was not "incident to service." *Id.* at 312. Significantly, the court in making it's decision stated that "the plaintiffs active duty status, standing alone, is insufficient to invoke the Feres doctrine's bar." *Id.* at 311. Instead of treating duty status as the decisive factor, the Fourth Circuit followed the conclusions from other cases that stated the receipt of medical treatment at military facilities is in and of itself "incident to service." *Id.* While noting that four justices on the United States Supreme Court believed that Feres was wrongly decided, the Fourth Circuit nonetheless felt obliged to apply precedent. *Id.* at 313. The Fourth Circuit dismissed the suit, yet declined to use active duty status as a dispositive factor.

The Fifth Circuit also does not use active duty status as a "brightline" conclusive test. In *Cortez v. United States, supra*, at 728, a service member on the TDRL jumped from a window of an Army Medical Center. The serviceman's widow brought an FTCA suit claiming that the medical personnel at the hospital failed to prevent his suicide. *Id.* at 724. In response to the government's contention that the *Feres*

doctrine barred her suit, the plaintiff argued that injuries occurring while the service member is on TDRL are not "incident to service." *Id.* The Fifth Circuit agreed with the plaintiff and specifically stated that "a listing on the TDRL [is not] considered the equivalent of active duty." *Id.* at 726.

The court in *Cortez* noted that *Brooks* has repeatedly been reaffirmed by the Supreme Court, that "Brooks' injury did not arise out of or in the course of military duty," and that Brooks was "under compulsion of no orders or duty and no military mission". *Feres* at 146. With respect to "active duty status," the Fifth Circuit cited its earlier holding in *Adams v. United States*, 728 F.2d 736 (5th Cir. 1984): "As in *Adams*, Cortez's treatment by personnel at the military hospital was not intended or likely to result in his return to active duty. His fatal injury was not an incident to service." *Id.* at 726.

Carter's status was not in "limbo." He was told that once he recovered from the planned operation to surgically insert a "shunt," he would be medically discharged from the service. At the time of his suicide, ". . . Cortez was not hospitalized at the army medical center pursuant to a military order or mission, direct or indirect. [ ] That concern [military discipline] has no relevance in the present litigation." *Id.* at 727. "*Cortez's death was not caused by a service-connected injury. Feres is applicable only to such injuries.*" *Id.*, emphasis added.

The Fifth Circuit in *Cortez* renounced status as determinative of its decision: "Based on the foregoing, we hold that a member of the armed forces carried on the Temporary Disability Retirement List is not, *as a consequence of that status*, prevented by the Feres exception from bringing an action under the Federal Tort Claims Act." *Id.* Then in a footnote, the Fifth Circuit exclaimed it was distancing itself from a contrary holding in the Eleventh

Circuit. "In so holding we reach a conclusion directly opposed to that reached by the our Eleventh Circuit colleagues. *See Ricks v. United States*, 842 F.2d 300 (11th Cir. 1988)" *Id.*, n.2. The Ninth Circuit below was asked at oral argument to follow *Cortez*. The court refused, restating its long line of cases holding military medical malpractice claims are *Feres* barred as incident to service, citing *Persons v. United States*, 925 F.2d 292 (9th Cir. 1991).

The Fourth Circuit has cited *Cortez* with approval in *Bradley v. United States*, 161 F.3d 777 (4th Cir. 1998) holding that "status" will not bar recovery for an "independent tort" (suicide). *Id.* at 780. "Cortez's suicide while in a military hospital was found to be an isolated act independent of any service connected injury." *Bradley* at 780.

Interestingly, the analysis in *Bradley* is oblique. The Fourth Circuit on one hand reaffirmed its holding in *Kendrick v. United States*, 877 F.2d 1201 (4th Cir. 1989) that (all) medical malpractice inflicted upon an active duty service member is *Feres* barred (similar to Ninth Circuit rulings) as incident to service; on the other hand, it held that a new medical malpractice injury (unrelated to the first) while on TDRL is not *Feres* barred. The court's opinion in *Bradley* goes on to combine *Brooks* and *United States v. Brown*, 348 U.S. 110 (1954) to say, "the fact that Bradley was scheduled for treatment at NNMC as a result of a service-related injury is not controlling." *Id.* at 781 (Service members on TDRL may return to active duty or exit the service depending upon various factors unrelated to medical malpractice.) This is but a further example of why the Court should grant review here and sharpen the focus of *Feres*.

The circuits are patently confused and in conflict on the role of "status" in *Feres* cases, the role of "incident to service," whether they be medical malpractice cases or not. The Ninth Circuit says a claim by an "active duty" service

member for military medical malpractice resulting in death is *Feres* barred (*Carter*); in the next breath, its says a claim by an active duty service member for military real property negligence resulting in death is not *Feres* barred (*Dreier*).

Not only do the standards in the Fourth, Fifth, Ninth and Eleventh Circuits conflict, they also directly conflict with the standards in the First, Seventh and Tenth Circuits. In the First, Seventh, and Tenth Circuits, the *Feres* inquiry ends when it is determined that the service member was on active duty.

In a First Circuit case, a service member who had injured himself playing basketball while off-duty, sought damages against military and civilian doctors for services negligently rendered in a military hospital. *Borden v. Veterans Administration*, 41 F.3d 763 (1st Cir. 1994). The court ruled that the decision to apply the "incident to service" test depended on the plaintiffs military status. *Id.* at 763. The First Circuit also decided that the plaintiffs claim was barred, regardless of the fact that he was off-duty at the time of the injury, because he was an active duty service member and such persons are entitled to medical treatment at military hospitals. *Id.* at 763-64. After determining that active duty service members are entitled to such medical benefits, the First Circuit ended its inquiry and barred the service member's suit.

In the Tenth Circuit, "active duty status" automatically triggers the *Feres* bar to a service member's suit. In one particular case, a captain in the Air Force was injured while on terminal leave anticipating his retirement. *Madsen v. United States*, 841 F.2d 1011 (10th Cir. 198). Upon entering the hospital, the captain was placed on the Temporary Disability Retired List (TDRL). *Id.* at 1011. The plaintiff argued that the nature of his active duty was tantamount to military leave or discharge and therefore his FTCA suit

should not be barred. *Id.* at 1012. In response, the Tenth Circuit stated that "the Feres doctrine is predicated upon his military status at the time of the negligent act." *Id.* at 1012. The court also felt that the nature of the service member's involvement with the military at the time of injury did not change the fact that a person is still on active duty. *Id.* at 1013. In conclusion, the court stated that "once it is determined that a service member . . . was on active duty during the time military medical treatment was rendered, the treatment is necessarily incident to service and judicial inquiry ends." *Id.* at 1014. *Carter* (here) and *Madsen* squarely conflict with *Cortez* and *Bradley*, *supra*.

In *Dreier*, the active duty service member *falls* to his death held, not *Feres* barred. In *Cortez*, the service member *jumps* out a hospital window; held, not *Feres* barred. In *Carter*, the service member hangs himself with a bed sheet; *held*, *Feres barred*.

II.

THE GOVERNMENT HAS CHANGED HEALTH CARE DELIVERY.

(Copious Citations to this Presentation are omitted, but may be found in the briefs filed in the Ninth Circuit, below.)

Today's government health care model for service members and eligible beneficiaries has changed dramatically since the Supreme Court decided *Feres* over forty-nine years ago. The posited rationale in *Feres* progeny, that service member lawsuits (for medical malpractice) are the types of claims that would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness, no longer applies. The existing government health care model is not what it was, and the law must be adapted to changed circumstance.

A. The *Feres* Cases (*Jefferson* and *Griggs*)

The government argued in *Jefferson* and *Griggs* that to allow actions for medical malpractice under the FTCA would open the floodgates of litigation against the government for military medical malpractice with untold potential cost. The Court acknowledged these arguments in the *Feres* opinion. *Feres v. United States*, 340 U.S. 135, 139 (1950). The United States casualties in World War II were 1,097,927. Of the total casualties, 427,076 were deaths, and 670,851 were wounded. *Feres* was decided soon after the close of World War II and while the United States was deeply embroiled in the Cold War with nations of opposing views. The Berlin Airlift went from June 1948 to September 1949. On June 25, 1950 the Korean War began while *Feres* was being calendared for oral argument before the Supreme Court. Obviously, the Supreme Court could not ignore these prevalent realities in reaching its decision in *Feres* at the end of 1950.

The court in *Feres* reaffirmed its earlier decision in *Brooks*, that Brooks' injuries were not incident to service because the relationship of an active duty service member while on leave was not analogous to that of a soldier injured "while performing duties under orders." *Feres* at 146.

The Supreme Court's reaffirmation of its holding in *Brooks* has led to numerous holdings where courts have allowed FTCA recovery to military personnel for injuries incurred that were found to be not incident to service, despite the fact the service member was on "active duty." The *Feres* doctrine now needs to be more sharply focused under *Brooks* because of the historic changes the government has made in military health care delivery *and* because of the prevalent conflicts in circuits attempting to apply the *Feres* test, particularly the conflicting and confusing issue of service member "status."

The Supreme Court has not addressed cases involving injury due to military medical malpractice since the original *Feres* cases, *Jefferson* and *Griggs*. Circuit Courts of Appeals have plenarily followed *Feres* based upon the assumptive conclusion that all medical malpractice *is* incident to service. *Atkinson v. United States*, 825 F.2d 202 (9th Cir. 1987). The Supreme Court's earlier *Feres* opinion certainly never addressed the controlling issues of a *Feres* bar as set forth in *Cortez* and *C.R.S., supra.*

B. The Evolution Of Military Health Care

The Cold War ended in early 1989. In 1993, the Office of the Assistant Secretary of Defense (Health Affairs) sought to provide an entirely new concept of health care for the Department of Defense, making use of *civilian* capacity and keeping high quality health care affordable for service members and their families. The new program is known as TRICARE. TRICARE has been described as "re-engineering the system of military medicine." "The TRICARE program is a major evolution of the Military Health Services System — one that will accomplish the transition to a comprehensive managed health care system that will help to achieve the Department of Defense's health care mission into the next century." "TRICARE is a managed care program modeled after civilian managed care standards and is managed by the military *in partnership with civilian contractors*."

TRICARE was formally introduced to the services on January 9, 1995. On February 4, 1995, Mikeal James Carter committed suicide in a Navy hospital.

The Chairman of the Joint Chiefs of Staff, John M. Shalikashvili, has described the TRICARE program as "a movement in Congress to put the military in a system similar to one that is working well for civil service employees." "TRICARE Prime is a network of military and civilian hospitals, clinics and health care professionals which

is similar to civilian health maintenance organizations (HMOs)."

The Department of Defense also provides active duty members and their families assigned to geographically separated units an equitable health care benefit comparable to what is available at the military treatment facilities. The major benefits of the program include greater access to managed care providers, reduced out-of-pocket expenses, and less time away from the local mission and duty station. Active duty members are enrolled in TRICARE Prime and most likely will see civilian Primary Care Managers close to their duty stations. The deceased's duty station in Monterey was illustrative of this change, where *civilian* doctors provided health care services to service members (viz. Carter) and their dependents and other eligible persons, viz. retirees. Similarly, Oakland Naval Hospital employed civilian health care professionals, although it is now closed.

C. The Government Has Removed "Military Command" From Health Care

It is crucial for the Court to understand that the demilitarization of military health care began in 1993 included the removal of "line command" authority over health care delivery to service members. Furthermore, even within the medical corps, rank authority is no longer an issue in health care delivery because it is not uncommon for senior ranking doctors to work under the supervision of subordinate rank doctors. To add to this, military doctors work side by side with civilian contract doctors who are not subject to military orders.

Today, service members have the right to participate fully in *all* decisions related to their health care including the right to refuse recommended medical care; service members have the right to choose their own primary care manager; and,

where there are allegations of medical malpractice, a second level review is accomplished by an external *civilian* panel of medical experts. Clearly, district courts *having* jurisdiction to review claims of military medical malpractice for non-service related injuries will not involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness.

D. Civilian Control Of Military Health Care

The Assistant Secretary of Defense (Health Affairs) (ASD(HA)) is responsible for the effective execution of the Department of Defense's (DOD) health care mission. Authority, direction, and control over medical personnel, facilities, programs, funding, and other resource within the DOD has been delegated to the ASD(HA). Execution of that authority, direction, control shall be by the issuance of direction to the Secretaries of the Military Departments. Accordingly, the civilian-medical command structure is separate from the operations line command structure. For example, under the Defense Health Program, the ASD(HA) has issued instructions that the military components will make a vigorous effort to increase the role and representation of women, minorities, and people (civilians) with disabilities at all levels in the Military Health Services System (MHSS) and in the leadership and administration of TRICARE program. ASD(HA) (civilian executive authority) has authority, direction, and control to determine optimal role for private sector (civilian health care providers) in support of the MHSS during peacetime and during mobilization and operations *other than war*.

Most importantly, these changes have shifted the responsibility for medical care. "Final authority for care delivered within the direct care system rests with the military treatment facility commanders." This transfer of control to the treatment facility commander, *i.e.* hospital administrators,

was a major shift from what historically had been authority of the line commander, *as it was at the time the Feres decision was decided.* Whether a service member is fit for duty is decided by appropriate medical authority, as compared to historical line command authority. This medical authority is under the complete control of the (civilian) Assistant Secretary of Defense (Health Affairs). A line officer may not exercise control over an admitted service member to a military treatment facility. Decisions respecting duty status of service members when receiving medical care are medical in nature, not military. *As a matter of policy and where appropriate, active duty service members will receive their medical care from civilian, private medical care providers under contract with the Department of Defense.*

According to a Department of Defense internal memoranda, "[a]n active duty member *may* file suit against a contract practitioner who carries his or her own malpractice insurance or has such coverage through another contractor." This admission begs for judicial examination because the lower courts' *Feres* holdings ignore this government waiver of the *Feres* bar. Carter received health care services from a variety of practitioners, both military and private contractors.

III.

APPLICATION TO PETITIONER'S ACTION

Crucial to Carter's petition is the government's creation of TRICARE in 1993. TRICARE represents the culmination of the government's action to separate its delivery of military health care into two operational concepts and strategies: (a) Medical Readiness Strategic Plan designed to provide medical support for military training, readiness, and mission assignment/completion; and (b) TRICARE designed to provide every day managed health care support to all Department of Defense ("DOD") beneficiaries, modeled

after, and measured against, the best civilian managed care business practices **and *not* subject to line command authority**. *This petition only involves the Court's examination of the latter.*

The Ninth Circuit has reaffirmed that neither the place of injury nor duty status of the petitioner is determinative in a *Feres* analysis (except in claims of medical malpractice). *Dreier*, 106 F.3d 844, 852 (9th Cir. 1996), *citing Johnson v. United States*, 704 F.2d 1431, 1437 (9th Cir. 1983). Whether medical malpractice was committed by civilian or military health care professionals in Monterey or at Oakland Naval Hospital is not dispositive. Carter was not on a military mission or training exercise at the time he was injured or died. *Cf. United States v. Johnson*, 481 U.S. 681, 691 (1987). Carter was in the same position, for the same reasons, as that of other civilians, viz. dependents, beneficiaries, retirees and their families, survivors etc., entitled to receive the same quality of health care at the same facilities for the same everyday health care needs as other Department of Defense beneficiaries under TRICARE.

At the time the psychiatrist refused to attend to him, Carter was not subject to military discipline; no military interest is jeopardized by this civil suit; Carter's injuries and treatment needs were not related to a readiness mission/ training assignment. *On February 3, 1995 at the time the decision was made to operate on Carter, he no longer was fit for duty in the military and would have been medically discharged shortly after the operation.* Had Carter elected to forego his planned surgery, he would have been medically discharged immediately and become eligible for the surgery at a Veterans Administration hospital where the *Feres* bar is inapplicable. *United States v. Brown*, 348 U.S. 110, 113 (1954). Prior to Carter's death, he had already once been placed on inactive status. Petitioner's claims should not be *Feres* barred simply because Carter elected to have his exit

surgery performed by the Navy as compared to post-exit surgery performed by the Veterans Administration. The issue here is simply medical malpractice, health care — not traditional concerns of military command integrity as were involved in earlier *Feres* cases.

Many, if not all (depending on location) health care professionals providing services to service members and entitled civilians, have been and will continue to be (in greater numbers) civilian professionals rather than military medical officers whose roles are being limited to mission readiness and training support peculiar to the needs of their respective services. Stephen C. Joseph, M.D., Assistant Secretary of Defense (Health Affairs), "Military Medicine: In Step, Adept, Flexible," 11 *Defense Issues* 11, pp.1-7 (January 22, 1996).

These delineated changes in health care delivery, *supra*, implemented by the Department of Defense prior to Carter's death, eviscerate the rationale of the *Feres* preclusion doctrine here. Carter was not on a military mission/training event, nor under command authority. *Dreier*, *supra*. This contrasting point was made abundantly clear by this Court in *Johnson*: "Because Johnson was acting pursuant to standard operating procedures of the Coast Guard, the potential that this suit could implicate military discipline is substantial. The circumstances of this case thus fall within the heart of the Feres doctrine as it consistently has been articulated." *United States v. Johnson*, 481 U.S. 681, 692 (1987). Similarly, the Ninth Circuit's most recent military medical malpractice (*Feres*) case, *Jackson v. United States*, 110 F.3d 1484 (9th Cir. 1997), was correctly decided as *Feres* barred under the test advocated in this petition because the injury allegedly mistreated was received "incident to service" in a training exercise at a Marine Corps Base.

Here, the Naval psychiatrist's refusal to attend to Carter was not a command decision by a military officer, but simply

an incident of medical malpractice. Initially, Carter was placed on suicide watch pursuant to *Carter's* request. However, he could not be retained under suicide watch for more than 24 hours without having the psychiatrist attend to him and issue instructions for such retention (comparable to civilian medical practices).

The difference between Carter's petition and *Johnson* is that Johnson was on a military rescue mission and under the positive control of the FAA (under agreement with the military) who caused him to fly his helicopter into a mountain resulting in his death. Carter was admitted for injuries suffered in a vehicular collision wholly unrelated to service; and, Carter was not under the positive control of line command while in Oakland Naval Hospital.

The *Feres* Doctrine bars actions in "[t]he type of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." *United States v. Johnson*, 481 U.S. 681, 690 (1987). There is no military issue implicated in Carter's death. Carter's death is no different than if it had been that of his civilian widow under the same circumstances. *See* this Court's affirmation of recovery under FTCA for Brooks and their father, *Feres* at 146. Judiciary intervention in this case will not cause the Court to examine sensitive military affairs at the expense of military discipline and effectiveness.

Brooks controls herein because the Carter's injury and death "did not arise out of or in the course of military duty." *Brown* at 113. Similarly, as in *Brown*, there is no effect on military discipline stemming from the relationship between Carter and the psychiatrist who failed to attend him. The Court is not being asked to meddle in matters peculiarly *military* here, nor in its intervention is the Court being asked to judge discipline, supervision, or control military command

judgments. Carter's psychiatrist's refusal to attend to his patient was not subject to military command or military judgments. It was purely *medical* in nature, wholly unrelated to Carter's military status, except as a benefit entitlement to his employment: the same benefit entitlement the government's civil servants enjoy for non-employment injuries. *See Brown* at 113.

Carter's petition is clearly unlike *Shearer* (*United States v. Shearer*, 473 U.S. 52 (1985)) where the claim was based upon failure to properly supervise military personnel and "calls into question basic choices about the discipline, supervision, and control of a serviceman," *id.* at 58, or "complex, subtle, and professional decision as to the composition, training, . . . and control of a military force [which] are essentially professional military judgments," *id.* Carter entered the hospital and requested suicide status; he was not under orders to do so, but did so of his own volition. There was no military discipline, supervision or control issues involved in Carter's case.

Petitioner is not urging here the abrogation of the *Feres* doctrine, but merely that the factual events and circumstances of this case be examined and found to be outside of *Feres*. Such a ruling is *not* inconsistent with *Brooks* and *Feres*. Given the lack of a nexus between medical malpractice and military discipline a more sharply focused and simplified approach in the *Feres* doctrine is appropriate, *supra*.

CONCLUSION

A *Feres* preclusion cannot be justified for medical malpractice committed against service members when the government has removed totally "military command" from the equation for treatment for non-service related injuries within the United States under its TRICARE program. A service member who has the right to choose his doctor, who has the right to refuse medical treatment, or choose what treatment he will receive, whose line commander has no authority over his medical treatment, whose military/civilian doctor has no line command authority, who may be treated by a civilian doctor as commonly or more than a military doctor, does not *ipso facto* suffer an injury "incident to service." *This is particularly true where the service member is a victim of medical malpractice in the United States for care to an injury that occurred unrelated to service.*

The whole notion that military medical malpractice inflicted on service members is incident to service and therefore should be immune is grounded in factual rationales in existence over forty-nine years ago which no longer exist. There were then different facts and different perceptions of those facts. The times and circumstances have changed, and the law must evolve to reflect these changes.

More critical, however, is the need to remove the unfair, inequitable and inconsistent judicial outcomes for patients who suffer from medical malpractice, and die in the "wrong jurisdiction." Petitioner has not only been denied the benefit available to nearly every other United States citizen — the right to sue for medical malpractice — she has been denied it because her husband wore a serviceman's uniform in a judicial circuit where the judges are diametrically opposed to their colleagues elsewhere. Had Carter had the good fortune to die in another circuit, Petitioner's case would have long gone forward. This irrational dependence upon luck must be removed.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED MAY 18, 1999

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-17357

D.C. No. CV-96-02543-WHO

VALERIE JANE CARTER, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MIKEAL JAMES CARTER, DECEASED,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA.,

Defendant-Appellee.

MEMORANDUM[1]

Appeal from the United States District Court
for the Northern District of California
William H. Orrick, District Judge, Presiding

Argued and Submitted February 9, 1999
San Francisco, California

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1. This disposition is not appropriate for publication and may not be cited to or by the courts in this circuit except as provided by Ninth Circuit Rule 36-3.

Appendix A

Before: B. FLETCHER and TASHIMA, Circuit Judges, and WINMILL, District Judge.[2]

Valerie Jane Carter appeals the district court's dismissal of this action for the wrongful death of her husband. We have jurisdiction pursuant to 28 U.S. § 1291, and we affirm.

BACKGROUND[3]

Mikeal James Carter was employed as a corpsman for the United States Navy when, on June 3, 1994, he sustained injuries in an off-base automobile accident while he was off duty and driving his personal automobile. Approximately one week after the accident, Carter began experiencing severe psychological problems for the first time in his life.

These problems worsened during the summer, culminating in seizures and a temporary loss of consciousness in late September. Carter was treated in a private hospital for five days before being transferred to Oakland Naval Hospital ("ONH"). At some point during his stay at ONH, Carter was removed from active duty. He was returned to active duty as a corpsman and assigned to ONH on January 6, 1995.

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2. The Honorable B. Lynn Winmill, United States District Judge for the District of Idaho, sitting by designation.

3. The facts set forth in the following three paragraphs are those alleged in the complaint initiating this action. We are required to accept these facts as true and to construe them in the light most favorable to the plaintiff. *See Federation of African Am. Contractors v. City of Oakland*, 96 F.3d 1204, 1207 (9th Cir. 1996).

Appendix A

On February 1, 1995, Carter admitted himself to ONH's psychiatric ward to be placed under 24-hour suicide watch. Military doctors determined that he needed an operation in which a shunt would be inserted into his skull. This operation was scheduled for February 6, 1995. In preparation for surgery, Carter was taken off anti-depressants and was removed from suicide watch on February 3. The next day, he became severely depressed and anxious, causing military medical personnel to urge the treating military psychiatrist to reexamine him and return him to suicide watch. The psychiatrist refused to reexamine Carter or place him on suicide watch. Left alone in his room at ONH, Carter hanged himself that night with a bed sheet.

His wife, Valerie Jean Carter, brought this wrongful-death action against the United States under the Federal Tort Claims Act ("FTCA"), codified at 28 U.S.C. §§ 2671-2680, on behalf of herself, her husband's estate, and their minor children. She alleged that the psychiatrist committed malpractice by failing to reexamine her husband or return him to suicide watch. On the motion of the United States, the district court dismissed the complaint for lack of subject-matter jurisdiction pursuant to the decision of the United States Supreme Court in *Feres v. United States*, 340 U.S. 135 (1950). Valerie Carter urges on appeal that *Feres* is inapplicable to the particular facts of this case.

ANALYSIS

FTCA is a limited waiver of the United States' sovereign immunity from tort suits. *See United States v. Orleans*, 425 U.S. 807, 813-14 (1976). As this circuit has recognized, the

Supreme Court in *Feres* refused to extend that waiver to suits in which "the plaintiff's injury was sustained incident to his military service." *Jackson v. United States*, 110 F.3d 1484, 1486 (9th Cir. 1997). The commonly noted justifications for the *Feres* doctrine are:

> (1) The distinctively federal nature of the relationship between the government and members of its armed forces, which argues against subjecting the government to liability based on the fortuity of the situs of the injury; (2) the availability of alternative compensation systems; and (3) the fear of damaging the military disciplinary structure.

Dreier v. United States, 106 F.3d 844, 848 (9th Cir. 1997) (quoting *Persons v. United States*, 925 F.2d 292, 294-95 (9th Cir. 1991) (citations omitted)).

A motion to dismiss pursuant to the *Feres* doctrine is considered a motion to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure. *See Jackson*, 110 F.3d at 1486. The district court's decision to apply the *Feres* doctrine is reviewed de novo, and the plaintiff's factual allegations must be accepted as true. *See Dreier*, 106 F.3d at 847.

The courts "have given a broad reach to *Feres*' 'incident to service' test and have barred recovery by members of the armed services for injuries that at first blush may not have appeared to be closely related to their military service or

status." *Id.* at 848. An unwavering line of precedent, beginning with *Feres* itself, bars claims by service members against the United States for malpractice by military medical personnel. In the two cases consolidated with *Feres* (*Jefferson v. United States* and *United States v. Griggs*), the Supreme Court barred such claims. Every decision of this circuit addressing this type of claim since *Feres* has concluded that the claim is subject to the *Feres* doctrine. *See e.g., Hata v. United States*, 23 F.3d 230, 235 (9th Cir. 1994) ("The Ninth Circuit has consistently barred as 'incident to service' claims arising out of medical care provided to service members in military hospitals. [Footnote omitted.]"); *Persons*, 925 F.2d at 296; *Atkinson v. United States*, 825 F.2d 202, 206 (9th Cir. 1987); *Veillette v. United States*, 615 F.2d 505, 507 (9th Cir. 1980). What is more, all of these cited cases involved medical care for conditions not caused by or directly related to military service.

Carter cites no case in which any court has allowed a medical-malpractice claim against the United States by a service member on active duty to go forward. Given this, and given the weight of authority from this circuit arrayed above, it is clear that Carter's claim cannot survive the *Feres* doctrine. Instead of engaging in the futile task of trying to distinguish this authority, the appellant mainly argues that *Feres* is poor policy and that its underlying rationales are not so compelling today as they were 50 years ago, particularly because the military has increasingly modeled its medical benefits after those offered in the private sector. This is beside the point. We have often criticized the *Feres* doctrine for similar reasons but were nonetheless bound to

apply it. *See e.g., Persons*, 925 F.2d at 299 (collecting cases in which this circuit reluctantly applied *Feres*). As we have noted, limiting the reach of *Feres*, given its decades-long vitality, has become a matter for either Congress or the Supreme Court. *See id.*

AFFIRMED.

APPENDIX B — MEMORANDUM DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA DATED OCTOBER 29, 1997 AND FILED OCTOBER 30, 1997

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-96-2543 WHO

VALERIE JANE CARTER,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM DECISION
AND ORDER

In this wrongful death action brought by a United States Navy Corpsman's widow, Valerie Jane Carter, against the United States of America, the government moves, pursuant to Federal Rule of Civil Procedure 12(b)(1), to dismiss the action for lack of subject-matter jurisdiction. For the reasons set forth hereinafter, the Court GRANTS defendant's motion to dismiss, because the action is barred by the *Feres* doctrine.

Appendix B

I.

The following statement of facts is taken from the first amended complaint. This wrongful death action brought against the United States pursuant to the Federal Tort Claims Act ("FTCA") involves a Navy Corpsman, Mikeal James Carter ("Carter"), who committed suicide while a patient in the Oakland Naval Hospital. The action was filed on July 17, 1996, by Valerie Jane Carter, decedent's wife, who seeks $10,000,000 in damages for herself and their children.

On June 3, 1994, Carter was involved in an automobile accident while he was off-duty and off-base, and while driving his private automobile on a public roadway on a personal errand. He was treated for whiplash at a private hospital by civilian medical personnel and released. On or about June 10, 1994, Carter began to suffer extreme psychological problems for the first time, and was treated at his duty station by a civilian psychiatrist.

On September 27, 1994, Carter suffered a fifteen minute focal point seizure at his home. The next day, he returned to work, was examined, and returned to active duty. Near the end of his shift, he lost consciousness, and was transported to Oakland Naval Hospital for further evaluation. En route to the hospital he suffered another seizure, and as a result, was taken to a private hospital where he was treated by civilian personnel. Defendant then attempted to transport Carter to Oakland Naval Hospital, but Carter stopped breathing en route. Carter was taken to another private hospital, treated, and retained in the intensive care unit for

five days, after which time he was transported to Oakland Naval Hospital.

Oakland naval doctors removed spinal fluid from Carter, and diagnosed his problems as psychological in nature. Carter was placed on inactive status for observation, but returned to active duty on January 6, 1995 as a corpsman assigned to the Oakland Naval Hospital. Between January 6, 1995 and February 1, 1995, defendant removed additional spinal fluid from Carter. On February 1, Carter requested that he be admitted to Oakland Naval Hospital's psychiatric ward for 24 hour suicide watch and evaluation. At the Oakland Naval Hospital, Carter was again examined, and doctors decided to perform an operation on February 6, 1995 to insert a shunt in the rear of his skull. On February 3, Carter was taken off three anti-depressant medications. On February 4, he exhibited severe anxiety and depression, and military medical personnel on duty repeatedly requested that the treating psychiatrist in charge examine Carter and return him to suicide watch. The psychiatrist in charge refused to do so. That evening, defendant hung himself with a bed sheet in the Oakland Naval Hospital ward where he had been left unattended and alone. Plaintiff alleges that the direct and proximate cause of Carter's death was the naval psychiatrist's breach of an affirmative duty to attend to Carter, his patient, when properly requested to do so.

II.

Defendant now moves to dismiss the action for lack of subject matter jurisdiction, pursuant to the *Feres* doctrine.

Plaintiff has not filed an opposition, but did present oral argument at the hearing.[1]

In *Feres v. United States*, 340 U.S. 135 (1950), the Supreme Court held that the United States was not liable "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Id.* at 146. In the *Feres* opinion, the Supreme Court consolidated three cases, *Feres v. United States*, *Jefferson v. United States*, and

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1. On March 26, 1997, the Court issued an order permitting plaintiff to take limited discovery into issues that might conceivably provide a defense to the *Feres* doctrine, and ordered that the requested discovery be completed within ninety days. On June 9, 1997, defendant moved to dismiss the action, pursuant to the *Feres* doctrine. Carter did not oppose the motion by the parties' stipulated July 14, 1997 deadline. Rather, on August 5, 1997, three weeks after the deadline to oppose the motion to dismiss, Carter moved to continue the hearing date on the motion to dismiss from August 7, 1997 to February 5, 1998. Carter also moved to compel discovery.

The Court denied the motion to compel, without prejudice, for failure to comply with the Civil Local Rules. The motion to compel was never refiled.

The Court continued the hearing on defendant's motion to dismiss to October 24, 1997. Carter once again failed to oppose the motion to dismiss. Instead, on October 15, 1997, nearly two weeks after the deadline to file an opposition brief, Carter filed another request to continue the hearing until February 5, 1998. Carter sought the continuance in order to complete the limited discovery the Court had previously ordered to have been completed by the end of June, 1997. On October 20, 1997, the Court denied the request, finding that Carter had failed to demonstrate good cause for a further continuance.

United States v. Griggs, Executrix, two of which involved allegations of medical malpractice by military doctors. In *Jefferson*, the plaintiff, who had received an abdominal operation while in the Army, sued the government when it was later discovered that a military towel had been sewn up in his abdomen after the operation. In *Griggs*, the executrix of the decedent's estate sued for wrongful death after the decedent died, while on active duty, due to negligent and unskillful medical treatment by army surgeons. The Supreme Court found that no action against the United States existed under the Federal Tort Claims Act because the plaintiffs' injuries "ar[o]se out of or [were] in the course of activity incident to service." *Feres*, 340 U.S. at 146.

Defendant has cited numerous Ninth Circuit cases in which the court has found that medical treatment provided to service members by military physicians is considered "activity incident to service." Medical malpractice claims brought by servicemembers against the government have been routinely barred by the *Feres* doctrine. *See, e.g.*, *Hata v. United States*, 23 F.3d 230, 234-35 (9th Cir. 1994) (*Feres* doctrine barred medical malpractice and wrongful death claims by Sergeant's widow against Navy doctors for failure to properly diagnose and treat Sergeant's chest pains); *Persons v. United States*, 925 F.2d 292, 296 (9th Cir. 1991) (*Feres* doctrine barred malpractice and wrongful death claim against Navy for failure to provide adequate counselling and treatment to suicidal off-duty Navy officer); *Veillette v. United States*, 615 F.2d 505 (9th Cir. 1980) (*Feres* doctrine barred wrongful death suit against Navy alleging negligence by naval hospital staff in treating serviceman who was injured in off-duty motorcycle accident).

The Court is bound to follow this controlling authority. Although plaintiff relied heavily on the Ninth Circuit's recent opinion in *Dreier v. United States of America*, 106 F.3d 844 (9th Cir. 1997), that case did not purport to overrule the overwhelming weight of authority, including *Feres* itself, holding that medical malpractice and wrongful death actions by servicemembers against military medical personnel are barred by the *Feres* doctrine. Indeed, the court specifically noted that "a medical malpractice claim against a naval hospital [is] a situation squarely covered by other *Feres* doctrine cases and *Feres* itself." *Id.* at 853 n.8.

III.

For the reasons set forth above, IT IS HEREBY ORDERED that defendant's motion to dismiss the action for lack of subject matter jurisdiction, pursuant to the *Feres* doctrine, is GRANTED.

Dated: October 29, 1997

s/ William H. Orrick
William H. Orrick
United States District Judge

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA DATED OCTOBER 29, 1997 AND FILED OCTOBER 30, 1997

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-96-2543 WHO

VALERIE JANE CARTER,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

This matter having come before the Court, and the issues having been duly presented, and a decision having been duly rendered,

IT IS HEREBY ORDERED AND ADJUDGED that:

1. Defendant's motion to dismiss for lack of subject matter jurisdiction is GRANTED.

2. Judgment is entered in favor of defendant.

Dated: October 29, 1997

s/ William H. Orrick
William H. Orrick
United States District Judge